No. 77-863

In the Supreme Court of the United States

OCTOBER TERM, 1977

MARK FREDERICK BUTHORN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that he was prejudiced by cross-examination questions concerning a prior civil dispute and by remarks of the trial judge.

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on 22 counts of knowingly making fraudulent Medicare claims, in violation of 18 U.S.C. 1001.[1] He was sentenced to concurrent terms of four years' imprisonment on each count. The court of appeals affirmed.[2]

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[1]Petitioner was first tried on these charges in July 1976. At that trial, the jury was unable to agree on 26 counts and acquitted petitioner on two counts. Prior to petitioner's retrial, 4 of the 26 counts were dismissed with the consent of the government.

[2]The court of appeals rendered an unwritten opinion immediately after oral argument.

The evidence showed that petitioner, a podiatrist, practiced at a New York City clinic in 1971 and 1972, the clientele of which consisted primarily of Medicaid recipients (Tr. 29, 35). During that two-year period, petitioner prepared and submitted invoices included in the indictment, and billed the Department of Health, Education, and Welfare for treatments, injections and examinations that, according to the testimony of ten patients, had never been performed (Tr. 137-149; 208-216; 270-284; 310-323, 336-339; 410-419; 430-440; 463-468; 476-487; 529-547; 562-571; 586-600; Exhibits 1-28, 48).[3]

1. Petitioner contends (Pet. 5-10) that he was prejudiced by cross-examination concerning a 1973 civil dispute with Medicare officials that had resulted in an $8,000 assessment against him for failure to maintain proper records.

Petitioner had claimed on direct examination that sometime in 1975 he had thrown away patient records that allegedly would have established that he had performed the services disputed at trial (Tr. 862-863). On cross-examination, petitioner denied that he had previously been penalized for not keeping proper records. The court prohibited further questioning on the point at that time (Tr. 863-864).

On re-direct, however, petitioner again testified concerning his records, stating that they had been discarded because he had no reason to retain them (Tr. 934-946). Since "the door was opened [by petitioner] on redirect examination," the prosecutor was allowed to pursue the record keeping issue, including whether petitioner had

[3]Petitioner took the stand and testified that he had performed every service for which he billed each of the patients who testified (Tr. 681-848).

been previously penalized for failure to maintain proper records (Tr. 936-949). Petitioner acknowledged a prior dispute with Medicare officials but denied that the controversy involved improperly documented services; he claimed that Medicare officials had mistakenly paid for exempt services, necessitating his subsequent reimbursement of $8,000 (Tr. 942-949).

The court did not err in admitting this evidence. It was petitioner who claimed the existence and subsequent destruction of records that would have allegedly corroborated his testimony, and the circumstances surrounding the destruction of these documents was thus probative of his credibility. See 2 Wigmore, *Evidence* §278, p. 124 (3d ed. 1940); *id.* at 49-52 (1977 Supp.). Petitioner returned to that matter on re-direct and thereby opened the door for the subsequent inquiry. See *United States* v. *Canniff*, 521 F. 2d 565, 570 (C.A. 2), certiorari denied *sub nom. Benigno* v. *United States*, 423 U.S. 1059. That inquiry was for the limited purpose of showing that in 1973 petitioner had been assessed $8,000 for allegedly failing to keep records, and therefore that his explanation for the destruction of additional records in 1975 was improbable. The court gave complete and thorough cautionary instructions to the jury (Tr. 942, 945-946) and specifically directed that "[t]his particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the Hin Clinic for services

rendered in 1971. That is all" (Tr. 945).[4] In these circumstances, the court clearly did not abuse its broad discretion, in determining that the probative value of this evidence outweighed any potential prejudicial effect. See Rule 403, Fed. R. Evid.; *United States* v. *Cowsen*, 530 F. 2d 734, 738 (C.A. 7), certiorari denied, 426 U.S. 906;

[4]The full text of the objection and the court's instructions was (Tr. 944-946):

> MR. GRUNEWALD: Your Honor, I submit that this entire line of examination is objectionable because it is going—it is confusing the issues, it is creating an aura that is not fair to this defendant, who is standing trial for what he possibly is charged with doing in 1971 and now we are going to go far afield into all kinds of civil controversies which have nothing to do with this.
>
> THE COURT: There is certainly no aura being created.
>
> I will tell you members of the jury right now that this line of questioning is neither intended to nor may it be considered by you as creating any aura. We don't decide criminal cases in accordance with any aura. Cases must be decided on the issue of whether guilt as to a particular count is proved to the satisfaction of all twelve jurors beyond a reasonable doubt.
>
> This concerns every element of the alleged crime, all of which I will explain to you in much greater detail at the close of the trial.
>
> This particular line of inquiry is being permitted for a very limited purpose only, and that is to assist the jurors in considering the credibility of this witness as to his testimony that he threw out or destroyed cards or records in the Hin Clinic for services rendered in 1971. That is all.
>
> You must not assume that he did anything wrong or fraudulent or otherwise unlawful in connection with his dispute in Blue Cross.
>
> Furthermore, auras have no place in cases of this sort.
>
> I will overrule the objection.

United States v. *Fairchild*, 526 F. 2d 185, 189 (C.A. 7), certiorari denied, 425 U.S. 942.[5]

In any event, petitioner was not prejudiced by the questions about his previous civil dispute with Medicare officials. Petitioner's guilt had been independently established by the testimony of ten patients that petitioner had not performed services for which he billed Medicare. Moreover, petitioner's testimony that his prior dispute with Medicare officials had not involved any allegations of improper documentation was uncontradicted (Tr. 941-948). See *United States* v. *Canniff, supra*, 521 F. 2d at 570-571; *Price* v. *United States*, 282 F. 2d 769 (C.A. 4), certiorari denied, 365 U.S. 848.

2. Petitioner contends (Pet. 11-14) that remarks by the court during the proceedings deprived him of a fair trial. Several of the remarks about which he complains were not made in the presence of the jury (*e.g.*, Tr. 181-185, 358-359), and thus could not have affected the trial. See *United States* v. *Weiss*, 491 F. 2d 460, 468 (C.A. 2), certiorari denied, 419 U.S. 833. Many of the remarks were

[5]Contrary to petitioner's contention (Pet. 10), there was no attempt to impeach petitioner's character or general reputation for credibility. See Rules 404(b), 608(b), Fed. R. Evid. The question whether petitioner had had some prior difficulties in documenting his treatment to Medicare patients was directed solely at the issue of petitioner's record keeping. Petitioner relies (Pet. 6-7) upon the initial reaction of the trial judge that the prosecutor might be inquiring into a prior criminal act (Tr. 865). But the trial judge was later informed that the prior incident was not criminal and stated "then it is a proper field for cross-examination as to the validity of his record keeping" (Tr. 869). Nevertheless, the judge decided to preclude further questioning stating, "I am basing my ruling solely on the fact that he answered the question in the negative" (Tr. 870). Since petitioner did deny any prior record keeping difficulty, petitioner's claim that defense counsel was "obligated" to reopen the issue (Pet. 10) is unpersuasive.

made in direct response to improper objections, speeches, or conduct of defense counsel (Tr. 345-346, 364-365, 445, 448-451, 452, 494-497, 559, 578-579), or represented an effort by the court to prevent the trial from becoming bogged down in detail (Tr. 44-47) or in repetitious questioning (Tr. 189, 362, 370-371, 404, 448-449, 454-456, 562). See *United States* v. *Sclafani*, 487 F. 2d 245, 256 (C.A. 2), certiorari denied, 414 U.S. 1023. In addition, "while the judge from time to time took defense counsel to task, he did not hesitate likewise to express disapproval of some of the prosecutor's tactics and to sustain numerous defense objections. On the whole * * * the trial judge * * * was relatively evenhanded." *United States* v. *Weiss, supra*, 491 F. 2d at 469. See, *e.g.*, Tr. 29, 39-40, 202, 216-217, 235-236, 280, 295, 298, 314, 383, 465-466, 711, 908. Finally, the court's cautionary instruction that the jury should "put out of [its] mind any exchanges which may have occurred during the trial between the lawyers, or between any attorney and the Court" (Tr. 1175) diminished any potential that the judge's remarks could have affected the jury's determination with respect to guilt or innocence.[6]

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[6]The full text of the court's instructions was (Tr. 1175-1176):

> Please put out of your mind any exchanges which may have occurred during the trial between the lawyers, or between any attorney and the Court. It is not my function to favor one side or the other, or to indicate to you, the jury, in any way that I have any opinion as to the credibility or truthfulness of any witness, or as to the guilt or innocence of the defendant. That is your function, that is yours alone, and I leave it entirely to you. So please don't assume that I hold any opinion in any matters concerning this case, and please don't reach any conclusion that I may have some attitude or that I may tend to favor one side or the other in the case. I don't.
>
> A trial is not a contest between lawyers. A trial is a search for truth. It is to bring out the evidence and allow the jurors to decide the facts, in accordance with the law.
>
> Please, members of the jury, don't regard me as impatient. I have a number of cases and it is my obligation to get the trial conducted as expeditiously as can be done and still permit a full disclosure of all the evidence and all the contentions to you. And that is what I have been trying to accomplish during the time we have been together here.

Thus, the record amply supports the decision of the court of appeals; there was no clear abuse of the trial court's discretion to "exert substantial control over the proceedings." *Geders* v. *United States*, 425 U.S. 80, 87. See *United States* v. *Boatner*, 478 F. 2d 737 (C.A. 2), certiorari denied, 414 U.S. 848; *United States* v. *Pellegrino*, 470 F. 2d 1205 (C.A. 2), certiorari denied, 411 U.S. 918. The issue does not warrant review by this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

FEBRUARY 1978.